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82-250

No. _____

In The

Supreme Court of the United States

October Term, 1982

DR. WILLIAM TRULY,

Petitioner

VS.

**Madison General Hospital,
Sidney L. Whittington, Jacob M. Ritchey, Hite Wolcott,
Donald Hawkins, Maybeth Gordan, L.C. Harris,
Strickland Sligh and Dr. T.O. Bailey, Dr. G.A. Carmichael,
Dr. Joe W. Terry, Dr. C.H. Heywood, Dr. George Allard,
Dr. A.P. Durfey, Jr., Dr. A.P. Durfey, Sr.
Dr. Mitchell B. Wells, Dr. Allen Roark,
Dr. William B. Featherston, and Dr. Robert Surratt,**

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EDWARD BLACKMON, JR.
232 West Peace Street
Post Office Drawer 568
Canton, Mississippi 39046
(601) 859-6500 or 355-0423
Attorney for Petitioner

Of Counsel:
BLACKMON & SMITH

QUESTIONS PRESENTED

(1) Whether respondents' failure to advise petitioner, in writing, of their specific reasons for denying him medical staff membership prior to petitioner being afforded an administrative hearing, violated Due Process and the Equal Protection Clause of the Fifth and Fourteenth Amendments to the Constitution.

(2) Whether petitioner's public criticism of local physicians and his political interest and involvement in politics was a substantial or motivating factor in respondents' decision to deny petitioner medical staff membership and thereby violate his rights secured by the First and Fourteenth Amendments to the Constitution.

PARTIES TO THIS PROCEEDING IN THE COURT OF APPEALS

Plaintiff-Petitioner

Dr. William Truly

Defendants-Respondents

Madison General Hospital
Sidney L. Whittington
Jacob M. Ritchey
Hite Wolcott
Donald Hawkins
Maybeth Gordan
L.C. Harris
Strickland Sligh
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TABLE OF CONTENTS

Page

Questions Presented i

Parties to This Proceeding in the Court of Appeals ii

Table of Authorities iv

Prior Opinion 2

Jurisdiction 2

Statutes Involved 2

Statement of the Case 2

Reason for Granting the Writ 4

Conclusion 8

Appendices

Appendix A (Opinion Below, Report and Recommendation of United States Magistrate) A-1

Appendix B (Opinion of District Court) B-1

Appendix C (Opinion of Court of Appeals) C-1

Appendix D (Conflicting Opinion) D-1

Appendix E (Statutory Materials) E-1

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Mango, 380 U.S., 545, 550 (1965) 5

Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir.) cert. denied, 368 U.S. 930 (1961) 5,6

Ferguson v. Thomas, 430 F. 2d 852 6

Mancuso v. Taft, 476 F. 2d 187 (1st Cir. 1973) 8

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 2 Ed 2d 471 (1977) 6

Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1949) 5

Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173 (1971) 7

STATUTES

28 U.S.C., Section 1254(1) 2

42 U.S.C., Section 1981, 1982, 2000(d) et seq. 2

Mississippi Code Section 41-13-15 through 41-31-51, 1972 Annotated 2

CONSTITUTIONAL PROVISIONS

First Amendment 2,7,8

Fifth Amendment 2

Fourteenth Amendment 2,5

MISCELLANEOUS

Federal Rules 5

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 22, 1982.

PRIOR OPINION

The unreported opinion of United States District Court Judge, Honorable Harold Cox, denying petitioner's Bill of Complaint for a preliminary and permanent injunction to enjoin respondents from denying petitioner medical staff membership appears in Appendix C, *infra*. The opinion of the Fifth Circuit Court of Appeals is reported in F.2d and appears in Appendix D, *infra*.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

The federal statutes involved are 42 U.S.C. Section 1981, 1983 and 2000(d) et. seq., as are the First, Fifth and Fourteenth Amendments to the Constitution.

Mississippi Code Sections 41-13-15 through 41-31-51, 1972 Annotated. Pertinent statutory provisions are set forth in Appendix A.

STATEMENT OF THE CASE

This is a lawsuit by a Black physician practicing in Madison County, Canton, Mississippi, who was denied medical staff membership at the respondent Madison General Hospital, a public supported county hospital.

Petitioner brought the suit against respondent hospital, its medical staff and Board of Trustees, in the United States District Court for the Southern District of Mississippi, pursuant to the First, Fifth and Fourteenth Amendments and under 42 U.S.C., Sections 1981 and 1983.

Petitioner alleged in his suit that respondents' denial to him of medical staff privileges was based on his race, his exercise of First Amendment protected rights, and that he was not afforded due process in the administrative hearings held before the medical staff and Board of Trustees.

At the trial, it was shown that after petitioner received his initial notice from the respondents that his application for medical staff membership received an adverse recommendation, he requested specific reasons for the adverse recommendation (R. 25). Respondents answered with a letter dated April 13, 1978, listing ten (10) reasons for the adverse action on his application.

Among the reasons listed by the respondents was their concern over a "probable inability of petitioner to work with the administration and staff of the Hospital as evidenced by numerous instances of severe public criticism of the administration and staff by petitioner during the last few years," (R. 692) and allegations by patients that petitioner was unavailable after office hours (R. 25).

Petitioner, through his attorney, prior to the hearing on his appeal of respondents' adverse action on his application requested more specific information regarding the instances when respondents alleged that he was unavailable to his patients after hours and specific instances where he had publicly criticized the Hospital and its staff.

Respondents answered petitioner's request by letter dated May 2, 1978 (R. 25) wherein they advised petitioner that the information he requested regarding adverse statements made by his patients was unavailable and could not be revealed because of doctor/patient privileges, and that the information he requested regarding specific instances of public criticism could be obtained by petitioner by contacting "any of the Jackson, Mississippi, stations or newspapers."

Petitioner was not advised until the date of the hearing (May 18, 1980) that the public criticism by him against respondents referred to a 1975 television program entitled **Probe** wherein he was interviewed on the subject of "patient care in the Madison County, Mississippi, area" (R. 119, 232).

Proof at trial also showed that respondents denied petitioner medical staff membership for reasons that included his "political interest," and his announced candidacy for Mayor of Canton, Mississippi (R. 25, 36, 315, 500).

Respondents also testified at trial that although they denied petitioner medical staff membership, they would permit him to admit a patient to the emergency room of the Hospital and treat him in order to save his life and then, thereafter, if he is to be admitted to the Hospital, the patient must be turned over to a staff physician (R. 115).

Respondents and the trial court dismissed the factors of competency and ethical conduct as matters upon which petitioner was denied medical staff membership.

Despite the finding that competency and ethical conduct was not an issue, and that petitioner had limited emergency room prileges, the trial Court denied plaintiff's application for injunctive relief (R. 241), which opinion was affirmed by the Court of Appeals, in an opinion by Judge Brown, Judge Goldberg and Judge Gee.

REASONS FOR GRANTING THE WRIT

(1) In endorsing the trial court's dismissal of petitioner's application for injunctive relief on the basis that petitioner had not been denied procedural due process, the court below has narrowed the individual's most basic and fundamental requirements under minimum procedural due process, that of being advised of the cause or causes of adverse action in sufficient detail to fairly enable one to show error that may exist; being advised of the names and the nature of the testimony of witnesses against him; and being given a reasonable time after such advice to be heard in his own defense.

In this instance the court below has found that referring petitioner to newspapers and television stations for reference to events spanning more than five years was sufficient enough to comply with minimum procedural due process.

The effect of the lower court's decision is to endorse what it referred to as "notice pleading" as being adequate in providing one entitled to a due process hearing, with the reason or reasons for denial of public employment.

In comparing the notice provided petitioner to that of the "notice pleading" requirements under the Federal Rules, the lower court overlooked the fact that under the Federal Rules a litigant has available to him the discovery provisions under the Federal Rules. No such provisions are made under most administrative proceedings. Here, petitioner had no enforceable discovery rules to require respondents to reveal the specific reasons for their denial of medical staff membership. The lower court now states that there is no notice requirement beyond that provided for under the Federal "notice pleading" requirement.

This proposition is contrary to the prior established precedent of the Fifth Circuit and of this Court.

The basic principal of the Due Process Clause of the Fourteenth Amendment is that no person shall be deprived of his life, liberty or property without an opportunity to be heard. *Armstrong v. Mango*, 380 U.S. 545, 550 (1965); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1949). The guarantee that a party whose rights are affected must be given the opportunity to defend himself is based upon the most elementary concept of justice.

The key to an effective hearing is, of course, the opportunity of each party to know and meet the evidence and argument against him. Such a hearing represents the sole method of protecting against possible arbitrary, invidious or discriminatory action which would prejudice an individual's substantive right.

The following have traditionally been held essential prerequisites to meeting the requirements of minimum procedural due process.

(1) the right to be advised of the cause or causes for denial of a right or privilege in sufficient detail to fairly enable one to show error that may exist.

(2) the right to be advised of the names and the nature of the testimony of witnesses against him.

(3) the right to be allowed a reasonable time after such advice to be heard in one's own defense. *Dixon v. Alabama*

State Board of Education, 294 F.2d 150 (5th Cir.) cert. denied, 369 U.S. 930 (1961); *Ferguson v. Thomas*, 430 F.2d 852.

The "notice pleading" requirement as announced by the lower court amounts to a substantial departure and reduction in the procedural requirements which petitioner was entitled to and as announced in *Dixon* and *Ferguson*, *supra*.

To let stand this proposition by the lower court could alter those fundamental protections afforded under the Fourteenth Amendment as reflected in the prior holdings of this Court.

(2) The trial court found that the reason listed by respondents as grounds for their denial of medical staff membership, that of petitioner's public criticism of local physicians and his involvement in local politics, was not the substantial or motivating factor in respondents' decision to deny him staff membership.

This finding by the trial court was clearly erroneous and contrary to law and the overwhelming weight of the evidence.

The burden of proof in a claim for denial of public employment for the exercise of a protected activity as outlined in this court's opinion in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 2 Ed 471 (1977), rest with the petitioner. *Mt. Healthy*, *supra*, held that the complainant must show that relevant conduct is constitutionally protected, and that said conduct was the substantial or motivating factor in the unfavorable action taken against him.

The trial court found that petitioner's competency and ethical conduct did not form the basis for respondents' denial to him of medical staff membership, and by implication, found that petitioner's ability to work with the hospital staff and other physicians was not at issue since petitioner did have limited emergency room privileges to treat patients in emergency situations (R. 950, 952). This limited privilege bestowed upon petitioner by respondents, negated any claims by respondents that they were concerned with petitioner's ability to work harmoniously and efficiently with other hospital staff members.

Absent competency, ethical conduct, and ability to work with others as legitimate factors for respondents' denial of medical staff membership, and other reasons listed by respondents must be given close scrutiny and observed to determine if they are "reasonably related to the operation of the hospital." *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173 (1971).

The other reasons listed by respondents as grounds for denial of medical staff membership, as shown by the record from the trial court, were remote and unrelated to the operation of the hospital and clearly pretextual in appearance and in fact.

An example of the respondents' foray into areas unrelated to the operation of the hospital was their attack on the method employed by the State of Mississippi to grant petitioner a license to practice medicine (R. 41, 427, p. 10, 11). Despite the acknowledged fact that petitioner held a valid Mississippi license to practice medicine, respondents continued to insist that petitioner had not met his burden of satisfying their curiosity in justifying the manner in which he was licensed by the State of Mississippi (R. 41, p. 10, 11).

Once the respondents' irrelevant considerations have been stripped away, and petitioner's professional qualifications have been dismissed as an issue, you have left only the exercise by petitioner of his constitutionally protected rights as grounds for respondents' denial of medical staff membership. It, thus, was the "motivating factor" in respondents' decision.

This court should be cautious not to permit the dilution of the protection afforded by the First Amendment. There is great danger here of erosion if the lower court's decision is left standing.

The signal would be sent that the highly conjectural criterion of temperamental unsuitability is a valid basis for determining whether a person is entitled to public employment. It will become a tempting subterfuge for denial of employment when other factors, such as the exercise of a protected activity, forms the real basis for the adverse action.

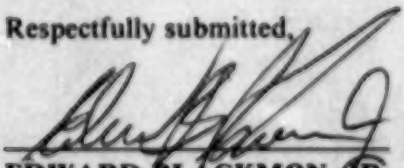
The physician's attitude, as long as it does not interfere with the delivery of health care, should have no bearing on his admission to staff membership at a public hospital.

Likewise, the physician's political interest should not bar him from staff membership at a public hospital. Candidacy for political office is an especially high form of expression, one for which public employees are well suited. *Mancuso v. Taft*, 476 F.2d 187 (1st Cir. 1973). Thus, any restriction on candidacy and political involvement must be reviewed with special care, since it affects a fundamental human right.

CONCLUSION

This Court should grant the petition for certiorari and hear the issues raised in this important area of the First Amendment and civil rights.

Respectfully submitted,

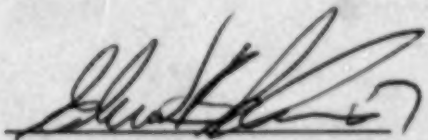


EDWARD BLACKMON, JR.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Edward Blackmon, Jr., attorney of record for the petitioner in the above entitled action, hereby certify that I have this day mailed, postage prepaid, by United States Mail, three (3) true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, to the Honorable Stanley F. Stater, III, Montgomery, Smith-Vaniz & Stater, Post Office Box 284, Canton, Mississippi 39046.

This the 11th day of August, 1982.



EDWARD BLACKMON, JR.